In The

Supreme Court of the United States

October Term, 1971

No. 71-373

CITY OF VIRGINIA BEACH, *Appellant,*

v.

HENRY E. HOWELL, JR., ET AL., *Appellees.*

and

CITY OF VIRGINIA BEACH, *Appellant,*

v.

STANFORD E. PARRIS, ET AL., *Appellees.*

and

CITY OF VIRGINIA BEACH, *Appellant,*

v.

CLIVE L. DuVAL, II, ET AL., *Appellees.*

On Direct Appeal from the United States District Court for the Eastern District of Virginia

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Of all the parties to this case only the City of Norfolk, which was also an intervenor below, has voiced any objection to the review of the court ordered reapportionment plan sought by Virginia Beach in its Jurisdictional Statement. Pursuant to Rule 16(4) of this Court, Virginia Beach submits the following comments in response to Norfolk's Motion to Dismiss.

ISSUES ON APPEAL

While a party to the ordinary lawsuit is customarily considered to be bound by the issues raised in his pleadings, this rule of thumb has no place here. Norfolk was able to cite only a legal encyclopedia for the irrelavant dictum that a plaintiff must conform his proof at trial to the cause of action set forth in his complaint. 41 AM. JUR. *Pleading* § 374 (1942). Norfolk disregards that the court ordered plan now appealed from bears little resemblance to the plan before the District Court when Virginia Beach intervened. Its avowed purpose for intervening was to defend the procedure employed in the 1970 census for counting Navy and Coast Guard personnel at the home port of their assigned ships.

As an intervenor, Virginia Beach unquestionably has the right to appeal from that portion of the District Court's interlocutory order which rewrote the city's representation and so drastically affected it and its citizens. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); 3B *Moore's Federal Practice*, § 24.15 at 566 (1969). And Virginia Beach is certainly not limited in this Court to the same arguments advanced by it in the court below. *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). Moreover, the portion of the District Court's order which affects Virginia Beach—the inclusion of 29,136 Virginia Beach citizens in Norfolk's seven-member 39th House District—was not a remedy sought by any of the parties. Nor was it ever mentioned or considered during trial of the case.

NOTICE OF CONSTITUTIONAL DEFECTS

It is not true, as Norfolk contends, that the General Assembly was on notice of constitutional defects in its reapportionment plan and therefore should have revised it before the District Court handed down its holding on July

2, 1971. Self serving arguments below by Senator Henry E. Howell, Jr., plaintiff in one case, and Delegate James M. Thompson, intervenor in another, that they had been unable to persuade the General Assembly to correct *allegedly* unconstitutional defects in its plan prove nothing.

As pointed out in the Jurisdictional Statement at 16, judicial intervention in the reapportionment process is appropriate only after the legislature has been given an "adequate opportunity" to prepare a constitutional plan. *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). In virtually every case the "adequate opportunity" accorded a legislature has followed a judicial determination that a particular apportionment plan was unconstitutional. See cases cited in Jurisdictional Statement at 15.

The General Assembly was entirely justified in awaiting the District Court's decision on the constitutional issue. The United States Attorney General had withdrawn his objection to the plan and the District Court gave no hint that it considered the plan unconstitutional in any other respect. There was at least as much reason to believe that the District Court would approve the General Assembly's plan as there was to think it would not.

THE PATENT UNFAIRNESS OF THE DISTRICT COURT'S PLAN

Virginia Beach does not advocate the transfer of citizens from Norfolk to Virginia Beach or from Virginia Beach to Norfolk. But if political boundaries must be ignored in favor of mathematical equality, the transfer of citizens from one political subdivision to vote with those of another must be made in a fair and logical way.

The District Court sought to achieve mathematical equality by placing 29,000 Virginia Beach citizens in Norfolk's seven-member house district and leaving the remaining citizens of Virginia Beach in a three-member district.

Fairness and logic require that if any transfer was necessary, 17,000 Norfolk citizens be transferred to a four-member district for the rapidly growing City of Virginia Beach. What the court did was even more unfair when it is recalled that 40,000 citizens of Virginia Beach are also included in Norfolk's three-member senate district. Norfolk makes no attempt in its Motion to Dismiss to justify why so many citizens of Virginia Beach must vote with the entire population of Norfolk in elections for *both* House and Senate. Such inequalities cannot be justified.

CONCLUSION

The City of Norfolk has failed to discredit any of the arguments advanced by Virginia Beach in its Jurisdictional Statement. While pointing out that the remedial powers of the District Court are discretionary, Norfolk has not suggested any reasons why the abuses of discretion cited in the Jurisdictional Statement do not constitute reversible error. Moreover, discretion is entirely irrelevant to consideration of the constitutional arguments made by Virginia Beach. The City of Virginia Beach respectfully requests that the Motion to Dismiss be denied.

Respectfully submitted,

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Dated: November 18, 1971.

CERTIFICATE OF SERVICE

I, Harry Frazier, III, counsel for the City of Virginia Beach and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief in Opposition to Motion to Dismiss in the United States Mails, first class postage prepaid, this 18th day of November, 1971, addressed to The Honorable Andrew P. Miller, Supreme Court Building, Richmond, Virginia 23219; James M. Thomson, Esquire, P. O. Box 1138, Alexandria, Virginia 22313; Edmund D. Campbell, Esquire, 1425 H Street, N.W., Suite 822, Washington, D. C. 20005; Stanford E. Parris, Esquire, 4085 Chain Bridge Road, Fairfax, Virginia 22030; C. Stanley Dees, Esquire, 314 North Pitt Street, Alexandria, Virginia 22314; Robert L. Weinberg, Esquire, 1000 Hill Building, Washington, D. C. 20006; The Honorable Joseph H. Campbell, Commonwealth's Attorney of Norfolk, P. O. Box 1531, Norfolk, Virginia 23501; The Honorable R. F. Horan, Jr., Commonwealth's Attorney of Fairfax County, Fairfax, Virginia 22030; The Honorable Gordon B. Tayloe, Jr., Assistant City Attorney, Norfolk, Virginia, 908 City Hall Building, Norfolk, Virginia 23501; The Honorable Henry E. Howell, Jr., 808 Maritime Tower, Norfolk, Virginia 23510; The Honorable Peter K. Babalas, 210 Rotunda Building, Norfolk, Virginia 23510; The Honorable Henry L. Marsh, III, Hill, Tucker and March, 214 East Clay Street, Richmond, Virginia 23219; Armand Derfner, Esquire, 520 Woodward Building, 733 15th Street, N.W., Washington, D. C. 20005; Benjamin W. Dulany, Esquire, 822 Southern Building, Washington, D. C.; C. V. Spratley,

Jr., Esquire, P. O. Box 575, Newport News, Virginia 23607; and The Honorable David L. Norman, Acting Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D. C. 20530.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. A-83 71-373

CITY OF VIRGINIA BEACH,
Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

No. A-84 71-364

JOAN S. MAHAN, ET AL.,
Appellants,

v.

HENRY E. HOWELL, JR., ET AL.,
Appellees.

MOTION TO AFFIRM SUBMITTED BY APPELLEES

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IN THE

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October Term, 1971

No. A-83

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., ET AL.,

Appellees.

No. A-84

JOAN S. MAHAN, ET AL.,

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v.

HENRY E. HOWELL, JR., ET AL.,

Appellees.

MOTION TO AFFIRM SUBMITTED BY APPELLEES

Appellees Henry E. Howell, Jr., et al, pursuant to Rule 16 of this Court, move that the interlocutory order and decree of the three judge District Court for the Eastern District of Virginia herein appealed from be affirmed as to the Senate of Virginia reapportionment plan on the ground that the question is so insubstantial as not to require further argument.

ARGUMENT

The action of the District Court in reapportioning the Senate of Virginia was plainly right and compelled by the uncontradicted and undisputed evidence before that Court

together with the clear requirements as to fair and equal representation pursuant to the Fourteenth Amendment of the Constitution of the United States as enunciated in the decisions of this Court.

It is important to appreciate the limited nature of the District Court's revision of the Senate reapportionment plan as enacted by the Virginia General Assembly. The Senate of Virginia is comprised of forty members, and the plan enacted by the General Assembly provided forty single-member districts. The District Court changed this plan only by consolidating the Fifth, Sixth and Seventh Senatorial Districts into one multi-member district from which three Senators are elected at large. Based on the total population, each of Virginia's forty Senators should ideally represent 116,212 persons. Since the new multi-member district has a population of 348,146, each of the three Senators represents 116,048 persons, only a miniscule variation from the ideal.

The undisputed evidence compelled the District Court to consolidate the Fifth, Sixth and Seventh Senatorial Districts into one multi-member district. Under the reapportionment plan enacted by the Virginia General Assembly, the Fifth and Sixth Senatorial Districts lay wholly within the boundaries of the City of Norfolk; the Seventh District was comprised of the balance of Norfolk's geographical area plus a contiguous area of the City of Virginia Beach. Based on the placement of Federal Census tracts within this total area, the three single districts created by the Virginia General Assembly were numerically equal, but the evidence before the District Court established without question that the *actual population* of each of the three districts was substantially unequal with the result that residents of the Fifth District would be over-represented and residents of the Sixth and Seventh Districts would be under-represented in comparison with the ideal representation of 116,212 persons per Senator.

This malapportionment struck down by the District Court arose from the treatment by the U.S. Census Bureau of naval personnel assigned to ships. The United States Naval

Station in Norfolk is recognized to be the largest naval installation in the world. It lies wholly within the former Fifth Senatorial District. It is the headquarters for the United States Atlantic Fleet and a vast number of naval vessels are "home-ported" there. The naval and other personnel who actually reside on the U.S. Naval Station were assigned to a particular Census Tract with finite geographical boundaries; there was and is no controversy among the parties that the persons enumerated in that Census Tract were, in fact, residents and part of the population for purposes of apportionment of the former Fifth Senatorial District. However, the entire 36,693 naval personnel assigned to vessels home-ported at the Norfolk Naval Station were enumerated in a separate Census Tract, a "tract" without any geographical boundaries. Though 18,000 of these naval personnel live *outside* the boundaries of the former Fifth Senatorial District, but within the boundaries of the former Sixth and Seventh Senatorial Districts, all 36,693 were arbitrarily assigned by the Virginia General Assembly as part of the *population* of the Fifth Senatorial District. It is emphasized that the appellants herein do not now and did not before the District Court dispute this evidence that 18,000 of these "home-ported" naval personnel actually reside outside the Fifth but within the Sixth and Seventh Senatorial Districts.

Therefore, based on this undisputed evidence, the *actual population* of the original Fifth Senatorial District is only 98,084, i.e. 18,000 persons less than the 116,084 erroneously computed by the General Assembly. Similarly, since the 18,000 naval personnel arbitrarily counted by the General Assembly in the Fifth District in fact were shown by the evidence to reside in and be a part of the population of the Sixth and Seventh Districts, the actual population of each of those districts is clearly substantially greater than the 116,103 and 115,959, respectively, computed to be the population by the General Assembly.